

1

2

3  
4  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

5

6

MAPLE LYONS and JERRY LYONS,

7

Plaintiffs,

No. C 09-4156 PJH

8

v.

**ORDER GRANTING MOTION TO  
DISMISS**

9

FIRST AMERICAN TITLE INS. CO.,  
et al.,

10

Defendants.

11

12       Defendant's motion to dismiss the complaint for failure to state a claim came on for  
13 hearing before the court on November 18, 2009. Plaintiffs, Maple Lyons and Jerry Lyons  
14 ("plaintiffs"), appeared through their counsel, Mark Johnson. Defendant, First American  
15 Title Insurance Company ("First American" or "defendant"), appeared through its counsel,  
16 Joel Siegel and Karen Marchiano. Having read all the papers submitted and carefully  
17 considered the relevant legal authority, the court hereby GRANTS defendant's motion, for  
18 the reasons stated at the hearing, and as follows.

19

**BACKGROUND**

20

21       This is a class action alleging discrimination in housing practices. Plaintiffs bring the  
22 action against First American on behalf of themselves, and all others similarly situated,  
23 alleging that defendant discriminates against minority homeowners on the basis of gender,  
24 race, color, and/or national origin, in its provision of residential title insurance policies. See  
generally Notice of Removal, Ex. D (Second Amended Complaint) ("SAC").

25

26       Plaintiffs specifically take issue with First American's provision of title insurance to  
27 refinancing homeowners. Plaintiffs allege that, pursuant to the mandatory rate schedule  
28 ("Rate Manual") that defendant has on file with the California State Insurance  
Commissioner, defendant has certain discounts that it applies in the provision of title

1 insurance. See, e.g., SAC, ¶ 16. There is, for example, a Basic Insurance Rate that is  
2 charged to homeowners purchasing their properties for the first time. See id. at ¶ 17.  
3 However, homeowners who purchase title insurance to cover their lenders in connection  
4 with a home refinance are entitled to significant discounts on the Basic Insurance Rate. Id.  
5 This refinancing discount is known as the Refinance Rate.

6 According to plaintiffs, First American has overcharged refinancing homeowners by  
7 selectively applying differing Refinance Rates. See SAC, ¶ 19. There are two Refinance  
8 Rates that defendant uses: (1) a Refinance Rate set forth in Section C-13(a) of the Rate  
9 Manual, which allows for more than a 50% reduction from the Basic Insurance Rate; and  
10 (2) a Refinance Rate set forth in Section C-13(b) of the Rate Manual, which allows for a  
11 30% discount off the Basic Insurance Rate. See id. at ¶ 21. As a matter of practice and  
12 policy, plaintiffs allege that defendant denies the first – and more generous – of these  
13 Refinance Rates to refinancing homeowners in cases where defendant or its agents  
14 considers the homeowner's underlying financing to be “non-prime” or “sub-prime.” Id. at ¶  
15 22.

16 Plaintiffs allege that a wealth of market data that is well known throughout the  
17 mortgage and title insurance industries and to defendant in particular, demonstrates a  
18 strong correlation between non-prime financing, and race and ethnicity. This data indicates  
19 that minorities receive non-prime mortgage financing far more often than do non-minority  
20 Caucasians. Id. at ¶ 23. Thus, allege plaintiffs, by routinely and systematically charging  
21 “non-prime” refinancing homeowners more for lender’s title insurance than other  
22 homeowners (i.e., by applying the second of the foregoing Refinance Rates), defendant  
23 has caused its minority title insurance purchasers to pay disparately excessive title  
24 insurance premiums. See SAC, ¶ 26.

25 On July 22, 2008, plaintiffs – African-American homeowners who refinanced their  
26 property on August 23, 2005 – filed their original action in Superior Court in Contra Costa  
27 County, alleging causes of action under California’s Fair Employment and Housing Act  
28

1 ("FEHA") and California Business & Professions Code § 17200. See Notice of Removal,  
2 Ex. A. On August 28, 2009, plaintiffs filed their second amended complaint in the state  
3 court action, adding for the first time a cause of action under the federal Fair Housing Act  
4 ("FHA"). On September 8, 2009, First American removed the action to this court. See  
5 generally Notice of Removal.

6 The operative second amended complaint, as it is currently pleads, thus states three  
7 causes of action: (1) violations of the FHA, 42 U.S.C. § 3601 et seq.; (2) violations of  
8 FEHA, Cal. Gov't Code § 12900 et seq.; and (3) unlawful business practices pursuant to  
9 California Business and Professions Code § 17200 et seq ("UCL"). See generally SAC.

10 Defendant now moves to dismiss the second amended complaint, on various  
11 alternative grounds.

## 12 DISCUSSION

### 13 A. Legal Standard

14 "A Rule 12(b)(6) motion tests the legal sufficiency of a claim. A claim may be  
15 dismissed only 'if it appears beyond doubt that the plaintiff can prove no set of facts in  
16 support of his claim which would entitle him to relief.' " Navarro v. Block, 250 F.3d 729, 732  
17 (9th Cir. 2001). Dismissal pursuant to Rule 12(b)(6) is appropriate where there is no  
18 cognizable legal theory or there is an absence of sufficient facts alleged to support a  
19 cognizable legal theory. Id. The issue is not whether a plaintiff is likely to succeed on the  
20 merits but rather whether the claimant is entitled to proceed beyond the threshold in  
21 attempting to establish his or her claims. De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir.  
22 1978).

23 In evaluating a motion to dismiss, all allegations of material fact are taken as true  
24 and construed in the light most favorable to the nonmoving party. See, e.g., Burgert v.  
25 Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)(citations omitted).  
26 In order to survive a dismissal motion, however, a plaintiff must allege facts that are  
27 enough to raise his/her right to relief "above the speculative level." See Bell Atlantic Corp.

1 v. Twombly, 550 U.S. 544, 553-56 (2007). While the complaint “does not need detailed  
2 factual allegations,” it is nonetheless “a plaintiff’s obligation to provide the ‘grounds’ of his  
3 ‘entitlement to relief’ [which] requires more than labels and conclusions, and a formulaic  
4 recitation of the elements of a cause of action will not do.” Id. A plaintiff must allege  
5 “enough facts to state a claim to relief that is plausible on its face,” not just conceivable.  
6 Twombly, 550 U.S. at 570.; see also Ashcroft v. Iqbal, \_\_U.S. \_\_, 129 S. Ct. 1937, 1950  
7 (2009).

8 “A claim has facial plausibility when the plaintiff pleads factual content that allows the  
9 court to draw the reasonable inference that the defendant is liable for the misconduct  
10 alleged.” Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556). “The plausibility  
11 standard is not akin to a probability requirement, but it asks for more than a sheer  
12 possibility that a defendant has acted unlawfully.” Id. “Where a complaint pleads facts that  
13 are merely consistent with a defendant’s liability, it stops short of the line between  
14 possibility and plausibility of ‘entitlement to relief.’” Id.

15 B. Defendant’s Motion to Dismiss

16 Resolution of First American’s motion requires resolution of three separate sub-  
17 issues raised by the parties: (1) whether plaintiffs’ FHA and FEHA claims are time-barred;  
18 (2) whether plaintiffs’ claims are barred by California Insurance Code section 12414.26;  
19 and (3) whether plaintiffs’ substantive claims under the FHA, FEHA, and UCL state legally  
20 cognizable claims for relief.

21 As a preliminary matter, the court notes that defendant has raised plaintiffs’ failure to  
22 exhaust administrative remedies as an additional ground for dismissal. The court,  
23 however, rejects this argument at the outset. As the parties acknowledge, plaintiffs were  
24 ordered by the state court in January of 2009 to exhaust their administrative remedies, as  
25 set forth in Insurance code § 12414.13. This provision allows any person “aggrieved by  
26 any rate charged” by a title insurer to request that the title insurer review “the manner in  
27 which the rate, plan, system, or rule has been applied with respect to insurance or services

afforded him" and, in the event relief is not granted by the title insurer, to file "a written complaint and request for hearing with the commissioner, specifying the grounds relied upon...". Cal. Ins. Code § 12414.13. However, the provision sets forth no specific procedure and/or form for compliance with it. Here, it is undisputed that: (a) plaintiffs sent a letter to the Insurance Commissioner on February 17, 2009, setting forth the details of the dispute, attaching the state court complaint, stating plaintiffs' belief that the commissioner's jurisdiction would be unavailing, and requesting that the commissioner decline jurisdiction; (b) that defendant responded to plaintiffs' letter by sending their own letter to the commissioner on March 5, 2009, making the same arguments regarding exhaustion that defendant raises by way of the instant motion; and (c) that the commissioner responded to both parties' letters by stating that the allegations raised in plaintiffs' complaint "do not call upon the specialized expertise of the agency," and that the commissioner would "respectfully decline" to exercise jurisdiction over the complaint. See Def. Request for Judicial Notice, Ex. A; Pl. Request for Judicial Notice, Exs. E, F.

The court finds that plaintiffs' actions in writing to the commissioner, and defendant's seized opportunity to respond, and the commissioner's letter declining jurisdiction subsequent to both parties' submissions, satisfy the general requirements of section 12414.13. Defendant's argument to the contrary improperly elevates form over substance, and invites the court to unnecessarily delay the proceedings. Thus, defendant's motion to dismiss on this additional ground is denied.

The court now turns to the three remaining arguments raised by defendant in support of dismissal.

1. Whether FHA and FEHA Claims are Time-barred

Neither party disputes that plaintiffs' FHA and FEHA claims are subject to a two-year limitations period or that, based on the allegations of plaintiffs' complaint, the FHA and FEHA claims fall outside the limitations period, since they were filed almost three years after the August 23, 2005 date of plaintiffs' refinance. Rather, the parties dispute plaintiffs'

1 ability to demonstrate that either equitable tolling or the continuing violation doctrine save  
2 the claims. Plaintiffs' complaint specifically alleges that both doctrines are applicable. See  
3 SAC, ¶¶ 51-58.

4 Defendant asserts first that equitable tolling cannot apply because all relevant facts  
5 were reasonably discoverable as of August 23, 2005. Specifically, defendant argues that:  
6 the Refinance Rates at issue were publicly filed with the CDI; that the rates charged to  
7 plaintiffs were fully disclosed at the August 23, 2005 closing; that the prime/non-prime  
8 distinction in the Refinance Rates is readily apparent on the face of the public rate filings;  
9 and that even plaintiffs' original complaint filed in 2008 cited to studies and articles  
10 published in 2005 and 2006 that disclosed the existence of impact-based discrimination in  
11 mortgage lending. See, e.g., SAC, ¶¶ 16, 37, 39, 41; Def. Request for Judicial Notice, Ex.  
12 B at 20; Notice of Removal, Ex. A at ¶¶ 24-27. All of which, according to defendant, means  
13 that plaintiffs should have known of the existence of their claim, and simply failed to  
14 exercise the due diligence required to timely assert their claim.

15 Defendant raises valid points. It is true enough, for example, that the public filing of  
16 defendant's Refinance Rates, and their disclosure on their face of the differences between  
17 the two Refinance Rates offered to prime and non-prime homeowners, suggests that  
18 plaintiffs maybe should have known of their claim in the exercise of due diligence.  
19 Similarly, it is suggestive of the same thing, that plaintiffs' original complaint acknowledges  
20 the existence of studies and articles that disclosed the existence of impact-based  
21 discrimination in mortgage lending. However, notwithstanding the undisputed and/or true  
22 nature of these facts, there remains a connection that these independent facts fail to make:  
23 i.e., the connection between the title insurance rates disclosed by defendant, and the  
24 specific knowledge of the disparate impact of *title insurance rates* on subprime  
25 homeowners by race. While the existent facts may have been sufficient to allow plaintiffs to  
26 make the foregoing connection on their own, the court declines to find that, as a matter of  
27 law, plaintiffs should have made the connection as of August 2005. For, as plaintiffs  
28

1 correctly note, "what [a plaintiff] knew and when [he] knew it are questions of fact," and in a  
2 close matter, where the trier of fact could reasonably find one way or another as to the  
3 question, this is a matter that is to be resolved by the trier of fact. See Simmons v. United  
4 States, 805 F.2d 1363, 1368 (9th Cir.1986); Bibeau v. Pacific Northwest Research  
5 Foundation Inc., 188 F.3d 1105 (9<sup>th</sup> Cir. 1999). So here. Normally, therefore, plaintiffs  
6 would be entitled to commence discovery regarding plaintiffs' knowledge of the facts giving  
7 rise to their causes of action under the FHA and FEHA.

8 With respect to the continuing violations theory alleged by plaintiffs, defendant  
9 actually has the better argument. Plaintiffs base their continuing violations argument on the  
10 fact that they are continuing to pay mortgage premiums which qualify as a single continuing  
11 violation. However, while the continuing violations doctrine is well established in the  
12 employment context, and even in the FHA context, see Havens Realty Corp. v. Coleman,  
13 455 U.S. 363 (1982), it has only been applied in situations where there is an ongoing  
14 violation that has been pled or proven. In Havens, for example, the petitioners were  
15 alleging a continuing pattern, practice, and policy of unlawful racial steering that deprived  
16 them of the benefits of interracial association arising from living in an integrated  
17 neighborhood, and petitioners furthermore alleged at least five separate incidents. Here,  
18 by contrast, plaintiffs have only alleged a single refinancing loan in August 2005, and no  
19 other incidents of improperly applied Refinance Rates that could qualify as a continuing  
20 violation at some point within the statute of limitations period. The fact that plaintiffs  
21 continue to pay premiums, based on the single refinancing act, constitutes only a  
22 continuing effect, as defendant notes. More importantly, however, plaintiffs have failed to  
23 set forth any case law or precedent that would support construing the allegations here as a  
24 continuing 'violation,' rather than a continuing 'effect.'

25 In sum, the court rejects plaintiff's theory that the continuing violation doctrine  
26 precludes application of statute of limitations, and would normally further find that, because  
27 triable issues of fact remain regarding equitable tolling, a dismissal of plaintiffs' claims as  
28

1 time-barred is not warranted at this time. However, in view of the court's rulings herein with  
2 respect to the remaining legal arguments raised by defendant – as discussed in detail  
3 below – the complaint must ultimately be dismissed in its entirety.

4       2. California Insurance Code section 12414.26

5       Defendant first contends that plaintiffs' action is barred by California Insurance Code  
6 § 12414.26, which provides: "No act done, action taken, or agreement made pursuant to  
7 the authority conferred by Article 5.5 [Rate Filing and Regulation] ... shall constitute a  
8 violation of or grounds for prosecution or civil proceedings under any other law of this state  
9 ... which does not specifically refer to insurance." Defendant argues that plaintiffs'  
10 complaint is essentially an improper challenge to defendant's rate-setting activities, since  
11 plaintiff's allegations target, at root, the very existence of defendant's Refinance Rates –  
12 both of which were publicly filed and disclosed pursuant to Article 5.5 of the Insurance  
13 Code. In response, plaintiffs assert that defendant's argument is premised on a 'filed rate'  
14 doctrine that has largely been discredited, and that plaintiffs do not at any rate take issue  
15 with the actual content or setting of defendant's rates, merely defendant's application  
16 thereof.

17       Defendant primarily relies upon Quelimane Co. v. Stewart Title Guaranty Co., 19  
18 Cal. 4th 26, 33 (1998), and Walker v. Allstate Indem. Co., 77 Cal. App. 4<sup>th</sup> 750, 758 (2000)  
19 for support of its argument. In Quelimane, the California Supreme Court considered  
20 whether Insurance Code § 12414.26, along with Insurance Code § 12414.29, provide the  
21 exclusive remedies for plaintiffs who allege unlawful conspiratorial conduct that is unrelated  
22 to rate-setting activities against defendant title insurers. The court ultimately answered this  
23 question in the negative, and found that § 12414.26 does not immunize title insurers from  
24 civil liability for certain state law claims, including UCL claims specifically. However, in a  
25 side-note relied on by defendant here, the court explicitly acknowledged that the foregoing  
26 provisions do, at a minimum, displace claims "as to title insurance company activities  
27 related to rate setting." Quelimane, 19 Cal. 4th at 33. The supreme court did not  
28

1 specifically address the circumstances in which § 12414.26 may displace claims in the rate  
2 setting context.

3 Two years after Quelimane was decided, the state appellate court decided Walker v.  
4 Allstate Indem. Co. There, the court considered a suit brought by a putative class of  
5 automobile insurance customers against numerous automobile insurers, in which plaintiffs  
6 asserted various state law claims (including a UCL claim) premised “on the insurers’  
7 charging approved rates alleged [] to be ‘excessive.’” See 77 Cal. App. 4th 750. The court  
8 held that Insurance Code §§ 1860.1 and 1860.2 – two provisions that form a part of the  
9 state’s “comprehensive scheme for the regulation of rates and rating practices” – barred  
10 plaintiffs’ action, reasoning that the provisions vest exclusive original jurisdiction over  
11 issues related to rate-making in the Insurance Commissioner.<sup>1</sup> Id. Pursuant to the  
12 “statutory scheme” enacted by voters in the form of the Insurance Code provisions at issue,  
13 continued the court, “the charging of an approved rate cannot be deemed ‘illegal’ or ‘unfair’  
14 for purposes of the [UCL].” Id. at 756. The Walker court duly noted the Quelimane court’s  
15 decision “up[holding] the viability of [UCL] claims against insurers...,” but simultaneously  
16 noted the court’s continued recognition of “the existence of statutory exceptions for  
17 ratemaking decisions.” See 77 Cal. App. 4th at 759.

18 Neither Quelimane nor Walker presents a factual scenario that is directly analogous  
19 to the facts at bar. Quelimane dealt with allegations of unlawful conspiratorial conduct  
20 among title insurers, the alleged effect of which was to deny title insurance on real  
21 properties acquired at tax sales. Walker, for its part, concerned a direct challenge to the  
22 actual rates set by automobile insurers. While these differences are undoubtedly relevant  
23 to the differing results reached by the courts in each case, however, the differences  
24 themselves yield to the overarching principle adhered to in both, and correctly urged on the  
25 court by defendant: i.e., to the extent civil state law claims are premised on allegations

---

26  
27 <sup>1</sup> As defendant points out, section 1860.1 of the Insurance Code, as construed by  
28 the court in Walker, contains nearly identical language as that contained in § 12414.26 of the  
Insurance Code (which governs title insurance specifically).

1 related to a defendant's actual rate-setting activities, then certain provisions of the  
2 Insurance Code, including section 12414.26, operate to bar those claims.

3 The question to be answered here is thus whether plaintiffs' claims and allegations  
4 do, in fact, challenge defendant's rate-setting activity, or instead challenge conduct that is  
5 unrelated to any rate-setting activities. Plaintiffs assert that their claims fall outside the  
6 scope of a traditional rate-setting challenge, because plaintiffs' allegations say nothing  
7 about the content or amount of defendant's rates. Rather, plaintiffs' argue that their claims  
8 allege that defendant's business practices, and the ways in which they are applied, are  
9 racially discriminatory – the determination of which is a common function performed by the  
10 courts.

11 On balance, the court concludes that plaintiffs' claims are, in fact, primarily premised  
12 on defendant's activities related to rate-setting. Although plaintiffs characterize their  
13 allegations as challenging defendant's practices in *applying* otherwise neutral, publicly filed  
14 rates, plaintiffs' allegations make clear that they are taking issue with the very *existence* of  
15 (1) the Refinance Rate disclosed under section C-13(a), and (2) the Refinance Rate  
16 disclosed under section C-13(b). Plaintiffs allege, for example, that “[i]n accordance with  
17 the Rate Manual and as a matter of explicit company policy, [d]efendant denies the more  
18 generous of its Refinance Rate discounts [] to refinancing homeowners in cases where  
19 [d]efendant ... considers the homeowner's underlying financing to be 'non-prime,'" all the  
20 while simultaneously alleging that the "Rate Manual states that the Refinance Rate  
21 discount 'does not apply to nonprime loans.'" See, e.g., SAC, ¶ 22; see also Cal. Ins. Code  
22 §§ 12401 et seq. (setting forth statutory rate-setting requirements). Thus, it is the fact that  
23 the two Refinance Rates in question – filed and disclosed under Article 5.5 as a result of  
24 statutorily mandated rate-setting activities – exist and set forth two different rates, that is  
25 the source of plaintiffs' grievance. The fact that plaintiffs' grievance is stated under the  
26 guise of a discrimination claim, does not change this analysis.

27 Nor does plaintiffs' opposition alter the above conclusion. Plaintiffs have not, for  
28

1 example, cited to any compelling – let alone controlling – legal authority in support of their  
2 argument that discrimination claims premised on an insurer’s rates are deemed to fall  
3 outside the rate-setting context as a matter of law. Furthermore, to the extent plaintiffs  
4 argue that defendant is relying on a ‘filed rate’ doctrine that has been discredited, this  
5 argument falls short of the mark. The ‘filed rate’ doctrine – which generally stands for the  
6 principle that the approval of an agency effectively establishes the lawfulness of challenged  
7 rates – is traditionally employed as a bar to actions in the antitrust context, not the  
8 discrimination context. See Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S.  
9 409, 416 (1986); Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922).  
10 Plaintiffs, moreover, cite to no Ninth Circuit authority upholding use of the filed rate doctrine  
11 in fields other than antitrust. See, e.g., Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d  
12 979, 992-93 (9th Cir. 2000)(discussing filed rate doctrine in antitrust context). Thus, any  
13 attempt by plaintiffs to analogize defendant’s arguments here to the filed rate doctrine more  
14 readily applicable in antitrust actions, is ultimately unpersuasive.

15 In sum, dismissal of plaintiffs’ state law claims against defendant, as stated in  
16 plaintiffs’ second and third counts, is warranted by Insurance Code § 12414.26. The court  
17 finds no authority at this juncture, however, for dismissing plaintiffs’ first count alleging  
18 violation of the Fair Housing Act. Defendant has ignored that portion of section 12414.26  
19 that expressly restricts protection from civil actions based on rate setting activities, to those  
20 actions or proceedings brought “under any other law of *this state*” – i.e., California law  
21 specifically. See Ins. Code § 12414.26. While defendant argues in a footnote that the  
22 McCarran-Ferguson Act acts to bar the federal FHA claim (since McCarran-Ferguson  
23 requires that no federal law invalidate any state law regulating the business of insurance),  
24 the court declines to dismiss the FHA claim without more substantive argument, and based  
25 solely on a passing reference raised for the first time in a reply brief footnote. See Def.  
26 Reply at 3, n. 3.

27 Accordingly, and for the above reasons, defendant’s motion to dismiss the claims  
28

1 stated in plaintiffs' FEHA and UCL counts is GRANTED. Furthermore, because the court's  
2 grant of dismissal is premised on the purely legal grounds set forth above, and there are no  
3 additional allegations that would suffice to cure the fundamental deficiency noted above,  
4 the dismissal of both claims is with prejudice.

5       3.     Substantive Claims for Relief

6       As an alternative ground for dismissal, defendant also argues that plaintiffs' FHA,  
7 FEHA, and UCL claims fail to substantively state cognizable claims for relief.

8       a.     FHA/FEHA claims

9       Plaintiffs have alleged that defendant has violated the anti-discrimination provisions  
10 of the FHA and FEHA by "charging minority homeowners with 'non-prime' refinancing  
11 disparately high amounts for lender's title insurance relative to what [d]efendant charged  
12 non-minority Caucasian title insurance purchasers." See SAC, ¶¶ 61, 63, 74 (alleging  
13 claims under § 3605 of the FHA, and §§ 12955(l) and 12955(d) of FEHA). Defendant,  
14 however, targets plaintiffs' ability to secure relief pursuant to either claim, noting that: (1)  
15 the sale of title insurance is not a statutorily defined "transaction" that is regulated under  
16 either FHA or FEHA; and (2) with respect to FEHA specifically, plaintiffs' claim pursuant to  
17 § 12955(d) fails for the additional reason that the sale of title insurance is not a statutorily  
18 defined "housing accommodation" as contemplated by the predicate Unruh Act. Plaintiffs,  
19 in response, assert that title insurers fall within the rubric of federal and state housing laws  
20 by virtue of the fact that refinancing is conditioned upon obtaining title insurance, and  
21 furthermore that defendant's discriminatory conduct affirmatively falls within the provisions  
22 of the Unruh Act.

23       As to the former issue, the parties concede that both the FHA and FEHA apply only  
24 to qualifying "real estate related transactions," and furthermore, that both statutes define  
25 "real estate related transactions" in nearly identical fashion. The FHA, for example, defines  
26 real estate related transactions in part as: "(1) [t]he making or purchasing of loans or  
27 providing other financial assistance – (A) for purchasing, constructing, improving, repairing,

1 or maintaining a dwelling; or (B) secured by residential real estate"; or "(2) [t]he selling,  
2 brokering, or appraising of residential real property. See 42 U.S.C. § 3605(b). By  
3 comparison, FEHA defines qualifying "real estate related transactions" in part as: "(1) [t]he  
4 making or purchasing of loans or providing other financial assistance that is for the purpose  
5 of purchasing, constructing, improving, repairing, or maintaining a dwelling, or that is  
6 secured by residential real estate;" or "(2) [t]he selling, brokering, or appraising of  
7 residential real property...". (FEHA). See Cal. Gov't Code § 12927(h). It further appears  
8 undisputed by the parties that, as a title insurer, defendant is not engaged in the practice of  
9 making or purchasing loans. Thus, the primary issue raised by defendant's argument is  
10 whether the sale of title insurance qualifies as "other financial assistance," such that  
11 defendant's conduct is proscribed by the FHA's and FEHA's reach.

12 There are no California cases that directly speak to this issue, nor is there Ninth  
13 Circuit authority that does so. The parties rely primarily on competing out of circuit federal  
14 authorities in unrelated insurance contexts to advance their differing positions. Defendant,  
15 for its part, principally relies upon a Seventh Circuit opinion that soundly rejected the notion  
16 that the provision of casualty and property insurance qualifies as "other financial  
17 assistance" under the FHA. See NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 297  
18 (7th Cir. 1992). As plaintiffs ask the court to do here, the plaintiffs in NAACP asked the  
19 Seventh Circuit to construe section 3605 of the FHA to cover defendant insurers. In  
20 refusing to do so, the court reasoned that "it would strain language past the breaking point  
21 to find that property or casualty insurance providers offer financial assistance for the  
22 purpose of purchasing a dwelling, in the same way that a lender offers such assistance."  
23 Id. As defendant points out, other district courts have similarly found that the provision of  
24 homeowners insurance is a form of "financial protection, not financial assistance," and thus  
25 not a "real estate related transaction" under the FHA. See, e.g., Home Quest Mortgage  
26 LLC v. Am. Family Mut. Ins. Co., 340 F. Supp. 2d 1177 (N.D. Kan. 2004); Doukas v. Metro.  
27 Life Ins. Co., 882 F. Supp. 1197, 1201-02 (D.N.H. 1995).

28

1 Plaintiffs, for their part, contrast these cases with other district court decisions that  
2 have found exactly the opposite, and concluded that homeowners may properly state  
3 claims against providers of property and liability coverage under the FHA. See, e.g., Ojo v.  
4 Farmers Group Inc., 565 F. 3d 1175, 1178 (9<sup>th</sup> Cir. 2009)(homeowner's insurance); Nevels  
5 v. Western World Ins. Co., 359 F. Supp. 2d 1110 (W.D. Wash. 2004)(liability insurance);  
6 Nat'l Fair Housing Alliance v. Prudential Ins. Co., 208 F. Supp. 2d 46 (D.D.C.  
7 2002)(homeowner's insurance). These courts largely reasoned that, because liability or  
8 homeowner's insurance is typically *required* in order to qualify for home purchases and  
9 similar benefits, the FHA should be construed to cover the provision of these types of  
10 insurance. See, e.g., Nevels, 359 F. Supp. 2d at 1121 ("the non-renewal of property  
11 insurance is actionable under § 3605 because it is financial assistance necessary to  
12 maintain a dwelling").<sup>2</sup>

13 Ultimately – and in view of the scant authority that exists and the conflicting results  
14 reached in the authority that *does* exist – the court is persuaded more by defendant's  
15 interpretation of the law, than by plaintiffs'. Namely, the court agrees with defendant that  
16 there is a meaningful distinction between homeowner's or other liability/property insurance,  
17 and title insurance. Homeowner's or other liability or property insurance provides a direct  
18 benefit to the homeowner or property owner in the event of loss, and is paid for directly by  
19 the owner, to the insurance company itself. As such, the argument that the mandatory  
20 provision of insurance to an owner in these circumstances constitutes "financial assistance"  
21 for the purposes of securing or maintaining a dwelling, makes a certain amount of sense.  
22 The same logic does not necessarily apply to title insurance, however. This is because, as  
23 defendant points out, title insurance "has unique attributes not shared by other types of  
24 insurance." See, e.g., Radian Guaranty, Inc. v. Garamendi, 127 Cal. App. 4th 1280, 1289  
25

26 <sup>2</sup> Notably, the FHA provision being construed in Ojo, the Ninth Circuit case relied  
27 on by plaintiffs, was 42 U.S.C. § 3604, not § 3605 as alleged here. Thus, the Ojo court did not  
28 have occasion to pass directly upon the circumstances under which homeowner's or other  
insurance qualifies as a "real estate related transaction."

1 (2005). Title insurance means insuring, guaranteeing or indemnifying owners of real or  
2 personal property or the holders of liens or encumbrances thereon against loss or damage  
3 suffered by reason of defects in the title to said property, among other things. See Cal. Ins.  
4 Code § 12340.1. It therefore covers the indemnifiable loss to a *lender*, measured by the  
5 extent to which the insured debt is not repaid because the value of the property is  
6 diminished or impaired by outstanding lien encumbrances or title defects covered by the  
7 title insurance. As such, title insurance is distinct from other types of insurance, in that it  
8 does not operate to provide direct protection solely to the homeowner. Rather, and as  
9 plaintiffs directly allege is the case here, title insurance protects the lender, and payments  
10 are made to the insurer on the lender's behalf, instead of the homeowner's behalf. See  
11 SAC, ¶¶ 38-39. In other words, the benefits of title insurance paid flow to the lender.

12 In light of this distinction and plaintiffs' allegations, the court is not persuaded that  
13 title insurance sold to plaintiffs ultimately provides true "financial assistance" to *plaintiffs*, for  
14 the purpose of purchasing or maintaining a dwelling, as is required for title insurance to  
15 qualify as a "real estate related transaction" pursuant to the FHA or FEHA. Indeed, in these  
16 circumstances, the court is more persuaded by the Seventh Circuit's reasoning in NAACP,  
17 that to so find would "strain language past the breaking point."

18 The court is not unsympathetic to the policy considerations urged upon the court by  
19 plaintiffs' counsel at the hearing on this matter, and acknowledges that some of those  
20 considerations may counsel in favor of reading the FHA and FEHA more expansively to  
21 cover the provision of title insurance. However, if such policy decisions are to be made,  
22 they are to be made by the appropriate entities imbued with the proper rule-making  
23 authority, and not by this court in the absence of controlling authority clearly indicating.

24 Defendant's motion to dismiss plaintiffs' FHA and FEHA claims for failure to state a  
25 claim upon which relief can be granted is therefore GRANTED, on grounds that plaintiffs'  
26 claims fail to plead the requisite "real estate related transaction" under either statute.  
27 Having so ruled, the court need not, and does not, consider the parties' remaining  
28

1 arguments as to whether the sale of title insurance is a statutorily defined "housing  
2 accommodation" as contemplated by the predicate Unruh Act.

3 The dismissal of plaintiffs' FHA and FEHA claims is with prejudice, in view of the  
4 legal nature of the deficiencies noted above, and the futility of any attempt to overcome the  
5 above-noted deficiencies with additional allegations. With respect to the FEHA claim  
6 specifically, the court also notes that the above-noted deficiencies provide an alternative  
7 ground for dismissal with prejudice, in addition to those already noted in conjunction with  
8 defendant's arguments pursuant to Insurance Code § 12414.26.

b. UCL claim

10 Defendant also contends that plaintiffs cannot state a cognizable claim for relief  
11 under the UCL. Plaintiffs' UCL claim alleges defendant's participation in "unlawful"  
12 business acts. See SAC, ¶¶ 79-84. Defendant argues that the claim fails because  
13 plaintiffs fail to allege any violation of Insurance Code § 679.71, the predicate statute upon  
14 which plaintiffs' UCL claim depends.<sup>3</sup>

15 Insurance Code § 679.71 states: "No admitted insurer that is licensed to issue any  
16 policy of insurance covered by this chapter shall fail or refuse to accept an application for,  
17 or to issue a policy to an applicant for, that insurance..., or cancel that insurance, under  
18 conditions less favorable to the insured than in other comparable cases...". The provision  
19 applies to insurance for (a) loss of or damage to real property; (b) loss of or damage to  
20 personal property; and (c) legal liability of "a natural person or persons for loss of, damage  
21 to, or injury to persons or property." Cal. Ins. Code § 679.70. California courts have  
22 furthermore construed the provision to apply to "particular kinds of insurance policies such  
23 as automobile liability policies and property loss policies." See State Farm Mut. Auto. Ins.  
24 Co. v. Haight, 205 Cal. App. 3d 223, 237-38 (1998).

25 The court is unpersuaded that § 679.71 covers defendant title insurer in this case.

1 Plaintiffs have not, in the first instance, cited any controlling legal authority that would  
2 support the claim that title insurers are subject to the foregoing anti-discrimination  
3 provision. Moreover, the language does not, on its face, support such a claim. As noted,  
4 the statutory provision applies to insurance for loss of or damage "to real property" and/or  
5 "to personal property." However, plaintiffs have failed to demonstrate that title insurance  
6 provides protection for loss of or damage "to" real property that would in turn trigger  
7 coverage under the provision. While plaintiffs contend that the Insurance Code definition  
8 for title insurance satisfies § 679.71, that definition states only that title insurance is defined  
9 as insurance "against loss or damage" suffered by an owner of real or personal property  
10 "by reason of" liens or encumbrances on, or defects in the title to said property, the  
11 invalidity or unenforceability of any liens or encumbrances thereon, or the incorrectness of  
12 searches relating to the title to real or personal property. See Ins. Code § 104. In other  
13 words, it says nothing about title insurance providing protection for loss of or damage "to"  
14 real property; rather, it protects against a more generalized "loss or damage" only, which  
15 loss or damage is in turn defined with reference to title defects specifically.

16 Given that plaintiffs have submitted no more than the foregoing in support of their  
17 argument that § 679.71 should be read to cover title insurers, and in view of the legal  
18 authority suggesting that the provision has traditionally been extended to liability and  
19 property insurers, the court concludes that plaintiffs have failed to allege actionable conduct  
20 on the part of defendant title insurer pursuant to § 679.71.

21 Since no other viable predicate statute remains upon which to base plaintiffs' UCL  
22 claims, the court accordingly GRANTS defendant's motion to dismiss plaintiffs' UCL claim,  
23 as stated in the third count of the second amended complaint. As noted in the preceding  
24 section in connection with plaintiffs' FEHA claim specifically, the court similarly notes that  
25 the foregoing deficiencies in connection with plaintiffs' UCL claim provide an alternative  
26 ground for dismissal of the claim with prejudice, in addition to those already noted in  
27 conjunction with defendant's arguments pursuant to Insurance Code § 12414.26.

28

1 C. Conclusion

2 For the foregoing reasons, the court hereby GRANTS defendant's motion to dismiss,  
3 on the specific grounds referenced herein. Because the motion is granted on grounds that  
4 Ins. Code § 12414.26 bars the UCL and FEHA claims, as well as on grounds that all three  
5 claims fail to state cognizable claims for relief as a matter of law, there are no additional  
6 allegations sufficient to cure the above-noted deficiencies, and the dismissal of all claims is  
7 with prejudice.

8 To the extent the parties have filed simultaneous requests seeking judicial notice of  
9 certain documents in connection with the present motion, the court furthermore GRANTS  
10 these requests.

11 **IT IS SO ORDERED.**

12 Dated: December 22, 2009



13 PHYLLIS J. HAMILTON  
14 United States District Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28